

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of )  
FREDERIC D. SYLVESTER )  
For Review of Resolution )  
No. 6-87-109 and Order No. 6-87-102 )  
of the California Regional Water )  
Quality Control Board, Lahontan )  
Region. Our File No. A-506. )

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ORDER NO. WQ 88- 14

BY THE BOARD:

On September 10, 1987, the Regional Water Quality Control Board, Lahontan Region (Regional Board) adopted Order No. 6-87-102 (the Order) and Resolution No. 6-87-109 (the Resolution). The Order contains waste discharge requirements for a resort development including a golf course to be constructed within the 100-year flood plain of Squaw Creek, a tributary of the Truckee River. Frederic D. Sylvester has petitioned the State Board for review of the Order and the Resolution, requesting that they be set aside.

I. BACKGROUND

Perini Land and Development Company (Perini) plans to build a resort development in Squaw Valley. The proposed project includes approximately 676 residential units in low-rise, mid-rise and single family structures, 12,000 square feet for conference facilities, 40,000 square feet for restaurants and shops, a pool and spa, an ice skating rink, tennis courts, roads

and parking, five ski lifts and associated ski trails and an eighteen hole golf course. On September 12, 1985, the Regional Board issued Order No. 6-85-113, establishing waste discharge requirements for the project but specifically excluding the golf course.

The proposed golf course is to be built within the 100-year flood plain of Squaw Creek which is tributary to the Truckee River. In 1985, when waste discharge requirements were issued for the remainder of the project, the North Lahontan Region Basin Plan prohibited all discharges within the 100-year flood plain of the Truckee River and the Little Truckee River and their tributaries. On September 13, 1985, the Regional Board adopted basin plan amendments which created exemptions from this prohibition for five categories of projects, including "public outdoor recreation". These basin plan amendments were approved by the State Board on January 23, 1986.

Subsequently, the Regional Board revised its waste discharge requirements to include the golf course, subject to the mitigation requirements in the basin plan amendments (Order No. 6-86-52). Golf course construction would require filling part of the flood plain including several acres of wetlands. Among the mitigation measures proposed by Perini, was construction of a number of sedimentation ponds to offset the filling.

Perini also sought a 404 permit from the Army Corps of Engineers. Based on recommendations by the Army Corps of Engineers, Perini changed the mitigation measures for the golf

course. Instead of the sedimentation ponds, Perini plans to construct 10.5 acres of artificial wetlands and 3.8 acres of enhanced existing wetlands (a total of 14.3 acres) to replace 8.4 acres of wetlands to be filled. There will also be some grading which will allow flow into some remaining ponds during a 100-year storm.

The Order revises the waste discharge requirements in Order 6-86-52 to permit the wetlands development in lieu of the sedimentation ponds. With the exception of a few other minor changes, it is identical to Order No. 6-86-52. The Resolution contains findings that the Project conforms with the requirements for an exemption from the basin plan prohibition.

After the Regional Board adopted the Order and the Resolution, the Corps of Engineers issued a 404 permit.

## II. CONTENTIONS AND FINDINGS

1. Contention: The Order and Resolution violate the basin plan because they do not require Perini to replace all flood plain areas and volumes lost due to the project.<sup>1</sup>

Finding: The applicable provisions of the basin plan state:

"All 100 year flood plain areas and volumes lost as a result of the project will be completely mitigated by restoration of previously disturbed flood plain area

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<sup>1</sup> We have determined that contentions raised by the petition which are not discussed in this order, fail to raise substantial issues that are appropriate for our review. (See 23 California Code of Regulations Section 2052, People v. Barry (1987) 194 Cal.App.3d 158.).

within the project site,.... The restored, or new or enlarged flood plain shall be of sufficient area and volume to more than compensate for the flood flow attenuation capacity, surface flow treatment capacity and groundwater flow treatment capacity which are lost as a result of the project."

The basin plan does not require that lost areas and volumes be replaced. It requires that they be mitigated. Moreover, it establishes criteria for judging whether mitigation is adequate. These criteria only require the flood plain to be of "sufficient area and volume to more than compensate for" lost flood flow attenuation capacity, surface flow treatment capacity and ground water flow treatment capacity." Adequate mitigation does not necessarily require one for one replacement of all areas and volumes lost due to the project.

The project, including the proposed mitigation, will reduce the flood plain area by 14.6 acres but, the project will increase flood plain volumes.<sup>2</sup> The Regional Board correctly concluded that the restored flood plain will more than compensate for the flood flow attenuation capacity, surface flow treatment capacity and ground water flow treatment capacity which are lost as a result of the project.

Flood flow attenuation capacity is the ability of the flood plain to hold back, temporarily store, or reduce peak flood flows. A good measure of flood flow attenuation capacity is the

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<sup>2</sup> This conclusion is based on the Regional Board record and additional documents which we have admitted into evidence, specifically, two letters dated September 28, 1988 and October 3, 1988, from Walter R. Auerbach, Senior Engineer, Raymond Vail and Associates addressed to Jennifer Soloway, Staff Counsel, State Water Resources Control Board.

volume of water stored during the 100-year flood. Since post-project flood plain volumes will exceed pre-project volumes, flood flow attenuation capacity will meet mitigation requirements.

Surface flow treatment capacity is the ability of the flood plain to improve the quality of water passing over it by natural processes. Surface flow treatment capacity will be improved within the 100-year flood plain due to the location of the 10.5 acres of new artificial wetlands. The existing wetlands, which will be lost as a result of the proposed project, are located so that they are inundated only in a 100-year event. The artificial wetlands will be more frequently flooded; by 2, 5, and 25, year events in addition to 100-year events. The more frequent flooding provides many more opportunities for surface flow treatment.

Ground water flow treatment capacity is the ability of the groundwater aquifer in the project area to improve the quality of water passing through it. The lost area of the flood plain should not substantially affect ground water treatment capacity. Whatever capacity is lost is compensated for by the four acres of deep rooted vegetation to be planted and by other vegetation in the wetlands.

2. Contention: The Regional Board did not consider the impact of more frequently flooded wetlands in relation to the use of fungicides and herbicides on the golf course.

Finding: The fact that certain areas of the flood plain will be subject to more frequent flooding would not necessarily indicate that more stringent requirements relative to herbicide and fungicide applications are required. The Order requires that herbicides and fungicides be applied in accordance with a Chemical Application Management Plan. The Executive Officer must authorize application of herbicides and the Regional Board must authorize application of fungicides. In each case, the Order requires that a finding be made that the limited use of these chemicals will not result in detection of the chemicals in any sampling wells. Thus, the control of herbicides and fungicides appears adequate to protect water quality.

3. Contention: Evidence regarding flood plain capacities is not reliable. The Corps of Engineers used the HEC-2 water surface profile computer program, which has not been validated for the conditions at Squaw Creek.

Finding: Reliance on the nationally recognized HEC-2 program was proper. The HEC-2 program cannot show the absolute capacity of the flood plain unless a 100-year flood passes through and capacities are calculated from the high water marks. However, it can be used to compute the relative capacities of the pre-project and post-project flood plain. Since the basin plan compliance determination required only a comparative analysis of the pre-project and post-project flood

plains, it was not necessary to validate the HEC-2 program for the specific conditions in the Squaw Creek flood plain.<sup>3</sup>

4. Contention: The Order requires compliance with certain provisions of the Settlement Agreement in the case of Sierra Club, et al. v. State Water Resources Control Board, Sacramento Superior Court No. 337405.<sup>4</sup> Perini, in its First Amended Complaint in Perini v. The Institute for Conservation Development, No. 78689, Placer County Superior Court, has given Notice of Rescission of the Settlement Agreement. Thus, the Order should be suspended pending a determination of the impact of the Notice of Rescission on Perini's compliance with the Order.

Finding: Section I.D.22. of the Order requires Perini to comply with all mitigation measures imposed by Placer County or as part of any litigation or settlement agreement,

"Specifically, the requirements of that Stipulated Order of Settlement in that lawsuit entitled Pierucci, et al. v. Placer County, et al. (Placer Co. Sup. Ct. No. 71955), and the applicable provisions of that certain Settlement Agreement entered into between the discharger and other parties on April 29, 1986, regarding the creation and functions of the TRC, the development and implementation of the test and monitoring program specified therein, and the

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<sup>3</sup> While the HEC-2 program is a reliable tool which assists in determining comparative flood plain volumes, it must be used in conjunction with topographical maps of the flood plain so that adjustments can be made to supplement HEC-2 outputs. Such adjustments were made for the comparative volume determinations in this case.

<sup>4</sup> The Order also requires compliance with the settlement in Pierucci, et al. v. Placer County, et al. (Placer Co. Sup Ct. No. 71955). However, that settlement agreement is not the subject of this contention.

development and review of the Golf Course Chemical Application Management Plan and related water quality plans shall be followed and implemented to the extent that they are not inconsistent with or less stringent than these waste discharge requirements."

The applicable terms of the April 29, 1986 settlement agreement (the Sierra Club litigation settlement agreement referred to in the contention) are incorporated into the Order by reference. They are part of the Order as if they were set forth in the order. Regardless of any changes in the settlement agreement due to actions by the parties to the settlement agreement, the requirements in the Order remain the same; the terms of the settlement agreement as it existed on April 29, 1988.<sup>5</sup>

### III. CONCLUSIONS

1. After development of the golf course, the flood plain areas and volumes will be sufficient to more than compensate for flood flow attenuation capacity, surface flow treatment capacity and ground water flow treatment capacity lost as a result of the project. Therefore, the golf course project complies with the basin plan requirements which are the subject of the petition.

2. More frequent flooding of the wetlands does not necessitate more stringent pesticide and fungicide controls.

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<sup>5</sup> Perini, in its written response to the petition, dated January 5, 1988, has acknowledged that the litigation referred to in the contention does not alter its obligation to comply with the all of the provisions of the Order. The terms of the Sierra Club settlement agreement as it existed on April 29, 1988, are provisions of the Order.

3. Reliance on the HEC-2 program was p... in t...  
case .

4. The applicable terms of the settlement agreement  
Sierra Club, et al. v. State Water Resources Control Board,  
Sacramento Superior Court No. 337405, are incorporated by  
reference in the Order as they existed on April 29, 1988.  
Subsequent actions by the parties to that settlement agreement do  
not change the Order.

IV. ORDER

The petition is denied.

CERTIFICATION

The undersigned, Administrative Assistant to the Board,  
does hereby certify that the foregoing is a full, and correct  
copy of an order duly and regularly adopted at a meeting of the  
State Water Resources Control Board held on November 15, 1988.

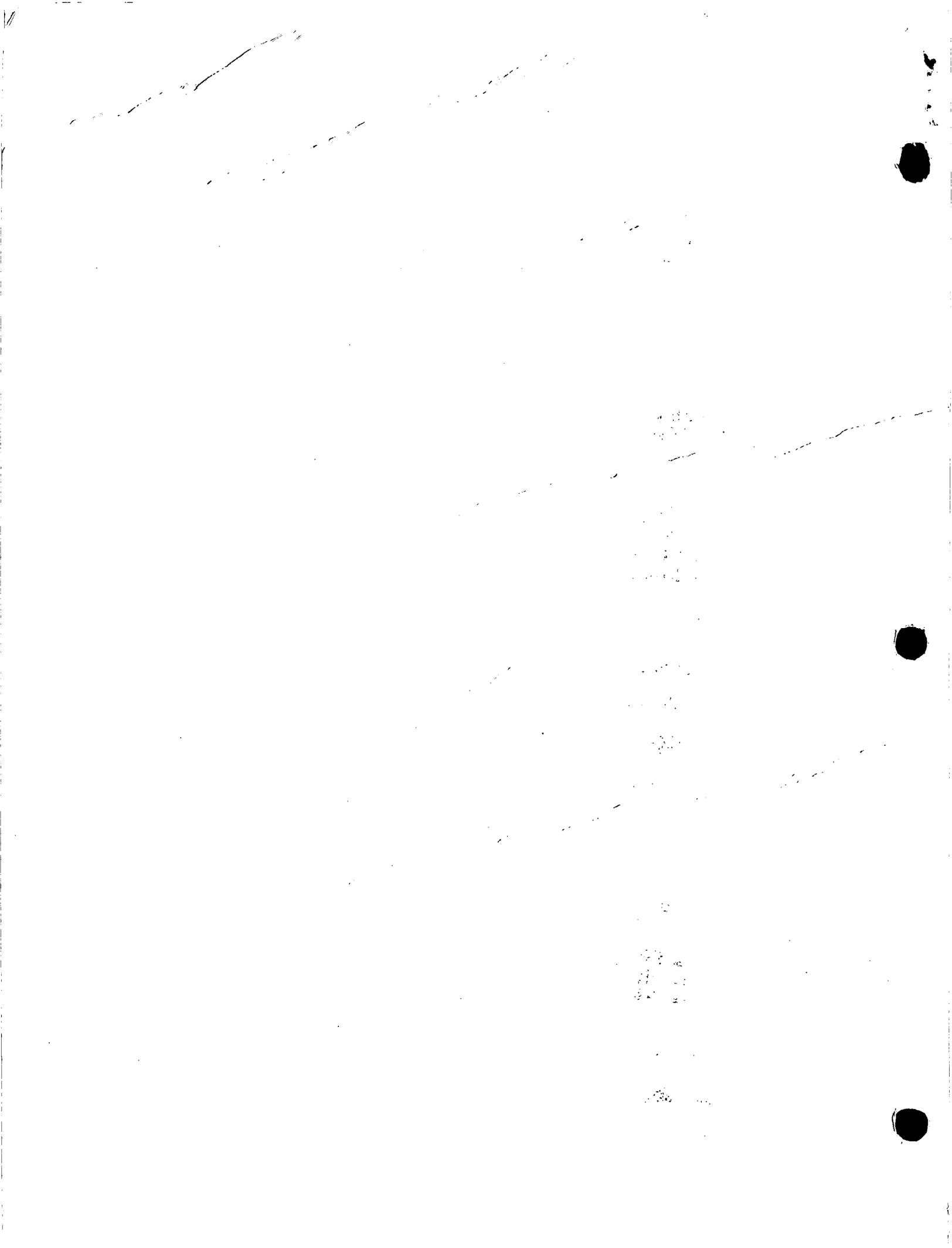
AYE: Darlene E. Ruiz  
Edwin H. Finster  
Eliseo M. Samaniego

NO: None

ABSENT: W. Don Maughan  
Danny Walsh

ABSTAIN: None

  
Maureen Marche  
Administrative Assistant to the Board



The Regional Board calculated the maximum civil liability as follows: 8 x \$1,000 = \$8,000 (\$1,000 per day for each of the eight days of discharge), plus 3 x \$65,000 = \$195,000 (\$10 per gallon x 6500 gallons x 3 days of discharge), plus 5 x \$5,000 = \$25,000 (\$5,000 per day x 5 days of discharge cited in the Cleanup and Abatement Order) for a total of \$228,000. The first component is authorized by Water Code Section 13265. The second and third are authorized by two different subsections of Water Code Section 13350. Subsection (d) applies to discharges for which the Regional Board has issued a cleanup and abatement order. Subsection (e) applies to discharges for which the Regional Board has not issued a cleanup and abatement order.

The record shows that Sandyland was able to complete required modifications to its operation by the February 23, 1988 deadline and, therefore, was required to pay only \$25,000 of the \$50,000 ACL.

## II. CONTENTIONS AND FINDINGS

1. Contention: Petitioner's first contention is that imposition of civil liability under both Sections 13350(d) and (e) is an abuse of discretion which resulted in a liability against petitioner greater than authorized by the statute.

Finding: Petitioner asserts that the Regional Board should have included all eight discharges in the October CAO and calculated the maximum ACL applying only subsection (d) and not (e). Petitioner reasons that if the Regional Board had done so,

the maximum liability would have been \$48,000 -- as contrasted with \$228,000 -- and presumably, the Regional Board would have imposed a lower final ACL. Sandyland further argues that section (e), which authorizes an assessment based on gallons discharged, is more applicable to discharges of oil or petroleum products or hazardous substances from large industrial sources where liability at the \$5,000 per day level may not be adequate to coerce the discharger into compliance rather than to operations like Sandyland. Petitioner's argument raises separate issues of authority and exercise of discretion.

A. The Regional Board's Authority

Section 13350 reads in part as follows:

"(a) Any person who (1) intentionally or negligently violates any cease and desist order or cleanup and abatement order hereafter issued, reissued, or amended by a regional board or the state board, or (2) in violation of any waste discharge requirement or other order or prohibition issued, reissued, or amended by a regional board or the state board, intentionally or negligently discharges waste, or causes or permits waste to be deposited where it is discharged, into the waters of the state and creates a condition of pollution or nuisance, or (3) causes or permits any oil or any residuary product of petroleum to be deposited in or on any of the waters of the state, except in accordance with waste discharge requirements or other provisions of this division, may be liable civilly in accordance with subdivision (d), (e), or (f).

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"(d) When there is a discharge, and a cleanup and abatement order is issued pursuant to